

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON**

IN RE ETHICON, INC., PELVIC REPAIR SYSTEM PRODUCTS LIABILITY LITIGATION	Master File No. 2:12-MD-02327 MDL 2327
THIS DOCUMENT RELATES TO: WAVE 5 CASES	JOSEPH R. GOODWIN U.S. DISTRICT JUDGE

**DEFENDANTS' MOTION TO COMPEL DISCOVERY OR IN
THE ALTERNATIVE, TO EXCLUDE CERTAIN OPINION TESTIMONY**

Defendants Ethicon, Inc. and Johnson & Johnson (collectively, “Ethicon”), by counsel, hereby move pursuant to Rules 26, 30, 34, and 37 of the Federal Rules of Civil Procedure to compel production of certain documents, data and other information that were the subject of the deposition of Scott A. Guelcher, Ph.D. on August 17, 2017. In support of this Motion, Ethicon shows to the Court:

1. Scott A. Guelcher, Ph.D. (“Dr. Guelcher”) is an expert witness retained by Plaintiffs. *See* Ex. A, Expert Witness Disclosure.

2. The Wave 5 deposition of Dr. Guelcher has been the subject of extensive motion practice, ultimately resulting in the scheduling of the Guelcher deposition on August 17, 2017, following a hearing before Magistrate Eifert on August 9, 2017.

3. As a part of the Second Amended Notice of Deposition [ECF 4323], attached hereto as Exhibit B, Ethicon requested that Dr. Guelcher bring to the deposition documents related to a 2017 study, which was the focus of the deposition. Document Request No. 1 is below in its entirety. Plaintiffs’ response [ECF 4370] to the request follows. *See* Ex. C, Responses and

Objections to Defendants' Second Amended Notice of Deposition of Dr. Scott A. Guelcher [ECF 4370].

Document Request No. 1: All Documents and Communications (including but not limited to (i) protocols, (ii) interim and final results, (iii) raw data, (iv) supplemental data, (v) reports of adverse events, (vi) informed consents, (vii) investigator brochures, (viii) publications and submissions, (ix) materials and minutes for any study meeting, (x) information regarding specimens and materials, and (xi) communications with co-authors, patients, health authorities, sponsors, investigators, or institutional review boards) relating to A.D. Talley, B.R. Robers, V. Iakovlev, R.F. Dunn, and S.A. Guelcher, *Oxidation and Degradation of Polypropylene Transvaginal Mesh*, J. of Biomaterials Sci: Polymer Ed. (2017).

Response: Plaintiffs object to this Request on the grounds that it is overly broad. Plaintiffs also object to the request as being beyond the scope of F.R.C.P. 26. Notwithstanding these objections, a copy of the final version of the requested article will be produced.

4. The objection interposed by Plaintiffs is not a valid objection to the request for production. Ethicon is prejudiced by the failure of Dr. Guelcher to produce the underlying data which is the basis for the published article and which is the predicate for his most recent opinions. Indeed, the only way for Ethicon to test the opinions set forth in the study is to review and analyze the underlying data.

5. Dr. Guelcher has access to all the underlying data for the study. Ex. D, Guelcher 8/17/17 Dep. 17:18-23. He did not ask the co-authors for their data in advance of this deposition because he “didn’t think it was appropriate.” *Id.* 20:4-8. *See also id.* at 86:17-87:12.

6. Ethicon is prejudiced by the inability to review, analyze and test the underlying data upon which the study is based.

7. Ethicon will file a Daubert motion on the study based in part on Dr. Guelcher’s inability to answer questions about the data contained in the study. A Joint Motion [ECF 4229] and Unopposed Motion [ECF 4511] to file the *Daubert* motion are pending with this Court.

8. Ethicon requests that this Court enter an Order compelling Dr. Guelcher and Plaintiffs to produce all of the underlying data responsive to Request No. 1 in the Document Request, or in the alternative, that Dr. Guelcher be precluded from offering any testimony or any opinions based on the 2017 Talley study.

9. Following the production of the requested information, Ethicon requests that the Court require Dr. Guelcher to sit for further deposition to explore the contents of the produced information.

10. Pursuant to Rule 37(a)(1), Ethicon certifies that it conferred with counsel to resolve this issue. Indeed, counsel for Ethicon anticipated this issue and raised this concern with counsel in advance of the deposition. *See* Ex. E, Email Correspondence with Plaintiffs’ Counsel (“We also asked for all of the raw data (FTIR, XPS, etc.) underlying the 2017 study”). Plaintiffs produced only the published documents. *See* Ex. F, Plaintiffs’ Production.

11. In support of this Motion, Ethicon refers the Court to the Memorandum of Law filed contemporaneously with this Motion, as well as the following exhibits:

Exhibit	Description
A	Plaintiff Expert Witness Disclosure;
B	Second Amended Notice of Deposition of Dr. Scott A. Guelcher dated August 14, 2017;
C	Plaintiffs' Responses and Objections to Defendants' Second Amended Notice of Deposition of Dr. Scott A. Guelcher dated August 15, 2017;
D	Scott Guelcher's 8/17/17 Deposition Transcript;
E	August 16, 2017 Email Correspondence with Plaintiffs' Counsel;
F	Plaintiffs' Production; and
G	Expert Report of Scott A. Guelcher, Ph.D.

WHEREFORE, Ethicon requests that the Court grant the relief sought by this Motion; that it be granted its cost incurred in connection with the Motion; and it be granted such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

/s/ David B. Thomas

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to CM/ECF participants registered to receive service in this MDL.

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